No. S121009
(Court of Appeal No. B160571)
(Los Angeles Super. Ct. No. KC036109)
(Hon. Conrad R. Aragon)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE EX REL. BILL LOCKYER, as Attorney General of the State of California,

Plaintiff and Respondent,

v.

R.J. REYNOLDS TOBACCO COMPANY,

Defendant and Petitioner.

PETITIONER'S BRIEF ON THE MERITS

H. JOSEPH ESCHER III (No. 85551)
MARC HABER (No. 192981)
CHANDRA MILLER FIENEN (No. 225502)
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4024
Telephone: 415/434-1600

Attorneys for Defendant and Petitioner R.J. Reynolds Tobacco Company

STATEMENT OF ISSUES

Review has been granted on three questions:

First, whether the court below erred in creating a split between California and the states comprising the federal Eighth Circuit plus Vermont on the correct interpretation of the preemptive effect of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. Sections 1331, *et seq.*, on state regulation of cigarette promotions. The majority opinion refused to follow the holdings of the *Jones v. Vilsack*, 272 F.3d 1030 (8th Cir. 2001) ("*Jones*") and *Rockwood v. City of Burlington, Vermont*, 21 F. Supp. 2d 411 (D. Vt. 1998) ("*Rockwood*") courts, instead interpreting the term "promotion" in FCLAA without reference to its ordinary meaning so as to exclude from its definition nonsale distribution of cigarettes to adult smokers. *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 112 Cal. App. 4th 1377, 1389-91 (2003), *rev. granted*, No. S121009, 2004 Cal. LEXIS 682 (Jan. 28, 2004) ("*Reynolds*"). It did this based solely on a subjective notion of the "context" of FCLAA, an approach rejected by the United States Supreme Court in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001) ("*Reilly*"). The majority's refusal to follow unanimous federal precedents was also in derogation of its obligation under *Etcheverry v. Tri-Ag Service, Inc.*, 22 Cal. 4th 316, 320 (2000) to give great weight and deference to federal court decisions construing federal statutes.

Second, whether the majority erred in interpreting Section 118950's safe harbor provision. The majority wrongly found that Appellant R.J. Reynolds Tobacco Company's ("Reynolds") distributions did not take place on public grounds "where minors are denied access by a peace officer or licensed security guard" (HEALTH & SAFETY CODE §118950(f)) because Reynolds did not exclude minors from some additional portion of the public grounds surrounding the age-segregated distribution areas. This interpretation of the safe harbor provision is contradicted by the statute's legislative history and adds words to the statute in violation

of a fundamental canon of statutory interpretation. CODE CIV. PROC. §1858.

Third, whether the majority erred in assessing the validity of the $14.8 million fine under the federal and state constitutions. In conducting the culpability analysis required by the excessive fines and due process clauses of the federal and state constitutions, the majority refused to consider Reynolds' good faith, and failed to consider the minimal harm, if any, that Reynolds' conduct in distributing free samples to certified adult smokers could have caused. In so doing, it ignored controlling precedent and created a conflict with other Courts of Appeal. *See Lusardi Constr. Co. v. Aubry*, 1 Cal. 4th 976, 996-97 (1992) ("[C]ourts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions"); *see also Whaler's Village Club v. Cal. Coastal Comm'n*, 173 Cal. App. 3d 240, 263 (1985); *S. Coast Regional Comm'n v. Gordon*, 84 Cal. App. 3d 612, 617 (1978); *No Oil, Inc. v. Occidental Petroleum Corp.*, 50 Cal. App. 3d 8, 30 (1975).

INTRODUCTION AND SUMMARY OF ARGUMENT

The divided Court of Appeal below affirmed a fine of $14,826,200 against Reynolds for the promotional distribution of cigarettes to certified adult smokers in segregated areas from which minors and nonsmokers were excluded by licensed security guards. That decision should be reversed on three independent grounds. *First*, the state statute under which the fine was imposed is preempted by federal law, since it directly is aimed at a traditional method of promoting cigarettes—the distribution of free samples. The majority incorrectly concluded that FCLAA, 15 U.S.C. Sections 1331, *et seq.*, does not preempt Section 118950 because it held that free samples are not "promotions" within the meaning of FCLAA's express preemption provision, 15 U.S.C. Section 1334(b). In order to reach this conclusion, the majority explicitly rejected unanimous

federal precedents interpreting the term "promotion" in that federal statute to include cigarette sampling. *Reynolds*, 112 Cal. App. 4th at 1391-94 (declining to follow *Jones*, 272 F.3d 1030 (8th Cir. 2001) and *Rockwood*, 21 F. Supp. 2d 411 (D. Vt. 1998)).

Second, even if Section 118950 was not preempted by FCLAA, Reynolds' promotional practices fell squarely within a statutory safe harbor that allows the promotional distribution of cigarettes on "public grounds leased for private functions where minors are denied access by a peace officer or licensed security guard." HEALTH & SAFETY CODE §118950(f). Despite this statutory language, Justice Ashmann-Gerst's opinion determined that Reynolds' distributions did not qualify under this safe harbor provision because minors had not been excluded from the public grounds surrounding the segregated distribution areas. This highly artificial reading would effectively gut the safe harbor provision and would functionally prohibit a traditional method of product promotion in California.

Third, even if the Court of Appeal correctly concluded that Reynolds violated the statute, its analysis of the constitutional limits of nondiscretionary statutory fines cannot be harmonized with the precedent of this Court and the United States Supreme Court. In finding a $14.8 million fine to be proportional to Reynolds' conduct—distributing cigarettes to current adult smokers within age-restricted facilities—the Court of Appeal made two clear errors: (1) failing to consider Reynolds' good faith and reasonable belief that its conduct was legal, and (2) refusing to consider the gravity of the harm, if any, caused by Reynolds' activities. This was inconsistent with well-established precedent from both federal and California courts. *See, e.g.*, *BMW v. Gore*, 517 U.S. 559, 578 (1996); *Lusardi Constr. Co.*, 1 Cal. 4th at 996.

STATEMENT OF FACTS

A. Section 118950(b)'s Prohibition Of Certain Nonsale Distributions.

Health and Safety Code Section 118950 makes it:

> unlawful for any person, agent, or employee of a person in the business of selling or distributing smokeless tobacco or cigarettes from engaging in the nonsale distribution of any smokeless tobacco or cigarettes to any person in any public building, park, or playground, or on any public sidewalk, street, or other public grounds . . . . (HEALTH & SAFETY CODE §118950(b))[1]

"Nonsale distribution" means "to give . . . cigarettes to the general public at no cost, or at nominal cost." *Id.* §118950(c)(1). Section 118950 *permits* the nonsale distribution of tobacco products in "any public building, park, playground, sidewalk, street, or other public grounds leased for private functions where minors are denied access by a peace officer or licensed security guard on the premises." *Id.* §118950(f). The statute imposes a $200 penalty for the first violation, $500 for two violations and $1,000 for each subsequent violation with a separate violation defined as a "distribution of a single package . . . to an individual member of the general public." *Id.* §118950(d). The stated purpose of Section 118950 is to reduce smoking among Californians, particularly the state's youth. *Id.* §118950(a)(11).

B. Reynolds' Distributions Of Promotional Cigarettes To Adult Smokers In Secure Enclosed Adult-Only Areas.

At six different events in 1999, Reynolds distributed promotional packets containing cigarettes to adult smokers in exchange for completion of a brand preference survey. As described below, the promotional cigarettes were distributed at each event only to current smokers who were at least 21 years old and only within a separately enclosed area contracted for by Reynolds.[2] A licensed

---

[1]Section 118950 was amended in 2001 (after the conduct at issue in this case) to expand its regulation of promotional distributions to private property. Unless otherwise noted, all citations to Section 118950 refer to the pre-2001 statute.

[2]Reynolds did nothing to hide its promotional activities from the State, which has long been aware of Reynolds' distribution of cigarettes samples within California. Indeed, Reynolds notified the State Board (continued . . .)

security guard was posted at the entrance of each distribution area to exclude minors.

At each event, agents identified potential participants from attendees. JA 135-36 ¶8, 236-37 ¶13. The agents only approached persons who (1) appeared to be 21 years of age or older, and (2) were either smoking, visually in possession of cigarettes, or wearing clothing with cigarette logos. JA 136 ¶8, 236-37 ¶13. The agents asked to see a valid form of government-issued identification to verify that the potential participant was at least 21 and checked to see that the potential participant possessed a pack of cigarettes containing one or more cigarettes. JA 136 ¶8, 237 ¶13.

If the adult smoker agreed to participate, the agent filled out a survey card regarding the participant's cigarette brand and style preferences as well as information about the quantity and frequency of the participant's cigarette purchases. JA 136 ¶9, 237 ¶14. The participant verified the accuracy of the information and signed the survey card certifying that the individual was a current smoker and at least 21 years old. *Id*. By signing the card, the participant agreed to be added to Reynolds' mailing list and to receive promotional offers from Reynolds. *Id.* The agent then signed the survey card and instructed the participant to take the completed form, identification and the participant's pack of cigarettes to a separate age-restricted area. *Id.*

The distributions took place only in designated separate areas—first a booth and later a tent—that Reynolds contracted for with the event promoter. JA 111 ¶¶7-8, 112 ¶¶16-17, 114 ¶¶35-36, 115-16 ¶¶44-45, 54-55, 116 ¶¶63-64, 124 ¶¶27-28. Ironically, the change from a booth to a tent occurred in November 1999 as a result of negotiations with the California Attorney General regarding the distribution facility located at the Pomona Raceway. The Attorney

---

(. . . continued)
of Equalization of its sampling activities within California, including the location and date that the promotional cigarettes were given out. JA 1264-67.

General had insisted that Reynolds' "Winston Booth" be fully enclosed within a tent made of opaque material so that minors would not see Reynolds' activities within the facility. JA 194 ¶3, 235-36 ¶7. Reynolds complied with this demand, ordering specially made tents. JA 235-36 ¶7.

Licensed security guards at the entrance to the distribution area checked each participant's identification to ensure that only persons 21 or over gained access to the area. JA 114 ¶38, 115 ¶47, 116 ¶57, 117 ¶66, 121 ¶¶8-9, 123 ¶¶19-20, 124-25 ¶¶31-32. The guards also verified that each participant possessed a pack of cigarettes and a completed survey card. *Id.* Within the distribution area, another agent verified for a *third time* the participant's age and possession of cigarettes. JA 114 ¶39, 115 ¶48, 116 ¶58, 117 ¶67, 121 ¶10, 123 ¶21, 125 ¶33. The agent checked to determine that the survey card had been properly filled out and made a digital photograph of the survey card and government-issued photo identification. JA 136-37 ¶12, 237-38 ¶18. Finally, the agent stamped the hand of each participant and marked the participant's package of cigarettes to prevent duplicate participation. *Id.* A total of 14,834 promotional packages were distributed at the six events. JA 1604.

C. The Proceedings And Ruling Below.

The Attorney General sued Reynolds in 2001, alleging that its distribution of promotional cigarettes had violated Section 118950. JA 3-4 ¶¶9-16; *see* JA 22-28 ¶¶9-37. Reynolds argued that FCLAA preempts Section 118950 and that the statute does not prohibit distributions to adult smokers that take place exclusively within an adult-only area from which minors are denied access by a licensed security guard. Because the disputed issues were legal questions of preemption and statutory interpretation, the parties stipulated to the pertinent facts (JA 110-18) and filed cross-motions for summary judgment.

FCLAA's express preemption provision precludes any state "requirement or prohibition based on smoking and health . . . with

respect to the advertising or promotion of . . . cigarettes." 15 U.S.C. §1334(b). The Superior Court found that FCLAA does not preempt Section 118950 and that Reynolds' promotional distributions of cigarettes violated Section 118950. JA 1602-10. Although the Attorney General contended that Section 118950 survived preemption because it is not a requirement or prohibition with respect to "advertising or promotion," the trial court rejected that argument. The lower court instead found that the statute is not "based on smoking and health," even as it acknowledged that concerns about the adverse health effects of cigarettes undeniably underlie the statute. JA 1608.

Without explanation, the trial court determined that Reynolds' distributions within a separate, age-restricted area did not qualify for the statutory exception for distributions on "public grounds leased for private functions where minors are denied access by a peace officer or licensed security guard on the premises." HEALTH & SAFETY CODE §118950(f); *see* JA 1603-04, 1609-10. After permitting additional briefing and a hearing regarding the penalty mandated by the statutory scheme, the Superior Court assessed a penalty of $14,826,200. JA 1604-05, 1611-15.

D. The Court Of Appeal Decision.

A divided Court of Appeal affirmed the Superior Court judgment, but relied in significant part on different substantive grounds. Writing for the majority, Justice Ashmann-Gerst did not address the trial court's finding that Section 118950 was not "based on smoking and health" (an issue abandoned by Respondent), and instead held that the statute avoided preemption because the distribution of free samples to potential customers (current adult smokers) was not a "promotion" within the meaning of FCLAA. *Reynolds*, 112 Cal. App. 4th at 1389-91. Relying on a "contextual analysis" of FCLAA's preemption provision, the majority found that "Congress did not make the meaning of 'promotion' clear." *Id.* at 1389-90. The majority failed to address the natural meaning of the

term, or its use by federal entities that evaluated cigarette advertising and promotion, including the Federal Trade Commission and the United States Surgeon General. Moreover, the majority rejected unanimous federal court precedent, finding cigarette sampling to be a "promotion" within the meaning of FCLAA. *Id.* at 1391. Although two federal courts invalidated state statutes like Section 118950 that barred cigarette sampling, the majority found those decisions unpersuasive "because neither interpreted the FCLAA contextually, as required." *Id*. The majority opined that "the word 'promotion' appears only once in the FCLAA. We decline to let 'promotion' be the tail that wags the dog." *Id*. at 1390.

In contrast to its treatment of the federal statute, the majority did not undertake a "contextual analysis" of Section 118950, and instead focused narrowly on the words of the statute, construing them restrictively. Its analysis of the safe harbor provision led the majority to conclude that "the phrase public grounds leased for private functions (leased public grounds) does not refer to areas sectioned off inside private functions." *Id*. at 1395.

The majority upheld the $14.8 million fine against both excessive fines and due process challenges. *Id.* at 1400, 1403. It acknowledged that courts are required to "examine the defendant's culpability" and "assess the relationship between the harm and the civil penalty." *Id.* at 1398 (citing *United States v. Bajakajian*, 524 U.S. 321, 337-39 (1998)). However, although admitting that Reynolds "made every attempt to restrict sampling to smokers 21 years of age or older and that it claims it acted in good faith," the majority refused to consider these facts as mitigating Reynolds' culpability because "ignorance of a law is not a defense to a charge of its violation." *Id.* at 1399 (citing *Hale v. Morgan*, 22 Cal. 3d 388, 396 (1978)).

Justice Doi Todd dissented on the ground that the majority's decision contradicted the plain language of FCLAA. *Id.* at 1403 (Doi Todd, J., dissenting); *see id*. at 1404 (noting that "the *Lorillard* court first turned to the statutory language of the FCLAA's

preemption provision"). The dissent explained its reasoning as follows:

> Based on Congress's failure to provide an independent definition of the term "promotion," as well as its single reference to that term, it is the majority's position that Congress must not have intended to regulate conduct which the majority characterizes as involving "how and where cigarettes are distributed." I disagree. The majority's interpretation is directly contrary to well-reasoned, unanimous federal authority, and results in an artificially and arbitrarily limited interpretation of the term "promotion" as used in the FCLAA. (*Id.* at 1406 (Doi Todd, J., dissenting) (citation omitted))

Because Justice Doi Todd found that the nonsale distribution of cigarettes was a "promotion," she concluded that FCLAA preempted Section 118950, and would have reversed the judgment against Reynolds. *Id.* at 1403 (Doi Todd, J., dissenting).

ARGUMENT

I.

SECTION 118950 IS PREEMPTED BY FEDERAL LAW.

A. FCLAA Expressly Preempts State Requirements And Prohibitions Based On Smoking And Health With Respect To The Advertising Or Promotion Of Cigarettes.

Section 118950 must yield to Congress's express intent to preempt state regulation of cigarette advertising and promotion. The Supremacy Clause commands that the laws of the United States "shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Congress can foreclose state action "by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment." *Reilly*, 533 U.S. at 541 (citations omitted); *see Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). In each case, Congressional purpose serves as "'the ultimate touchstone'" in preemption analysis.

Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (quoting *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963)). Regardless of the type of preemption, any state law that interferes with or is contrary to federal law is invalid. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992). While courts "work on the assumption that the historic police powers of the States are not to be superseded," that presumption cannot overcome "the clear and manifest purpose of Congress" to preempt state statutes, a purpose made manifest primarily through the language of the federal statute. *See Reilly*, 533 U.S. at 542 (citation and internal quotation marks omitted).

In FCLAA, Congress "crafted a comprehensive federal scheme governing the advertising and promotion of cigarettes" (*Reilly*, 533 U.S. at 541), whereby Congress reserved for itself and the Federal Trade Commission ("FTC") the regulation and restriction of cigarette advertising and promotional activities based on, or motivated by, concerns about smoking and health. *Id.* at 548. Under FCLAA's current preemption provision:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter. (15 U.S.C. §1334(b))

Congress's decision to preempt regulation of cigarette "promotions" occurred as part of a general expansion of the reach of FCLAA preemption. The United States Supreme Court has acknowledged that the current preemptive scope of FCLAA therefore is "'much broader'" than when Congress first enacted it in 1965. *See Reilly*, 533 U.S. at 545 (quoting *Cipollone*, 505 U.S. at 520). In 1969, Congress adopted the present language, which expanded FCLAA's express preemption provision in two important ways:

> First, the later Act bars not simply "statement[s]" but rather "requirement[s] or prohibition[s] . . . imposed under State law." Second, the later act reaches beyond statements "in the advertising" to obligations "with

> respect to the advertising or promotion" of cigarettes. (*Cipollone*, 505 U.S. at 520 (brackets original))

As it broadened FCLAA's preemptive scope, Congress clearly was aware that tobacco companies used sampling as a way to promote its products. Indeed, the Senate Report setting out the legislative history behind FCLAA notes that cigarette sampling was discussed in the context of tobacco company advertising and promotion:

> The cigarette manufacturers further stated to the committee that with respect to all other advertising, they would avoid advertising directed to young persons, and would continue to abstain from advertising in school and college publications, *would continue not to distribute sample cigarettes or engage in promotional activities on school and college campuses* . . . . (Appellant's Request for Judicial Notice filed with Appellant's Opening Brief ("RJN") Ex. B at 12 (S. Rep. No. 91 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2660) (emphasis added))

When Congress curtailed state regulation of cigarette advertising and promotion, it simultaneously prohibited cigarette advertising on radio and television altogether and authorized a federal agency—the FTC—to regulate cigarette advertising. *See Reilly*, 533 U.S. at 544; *see also* 15 U.S.C. §§1335, 1336. Moreover, "*to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC*" or Congress itself—not the states. *Reilly*, 533 U.S. at 548 (emphasis added).

The 1969 amendments thereby balanced protecting the public with ensuring that the national economy did not suffer under "diverse, nonuniform, and confusing" regulations relating to the advertising and promotion of cigarettes. 15 U.S.C. §1331(b). To preserve this balance, Congress expressly preempted States and localities from imposing any "requirement or prohibition" that is "based on smoking and health" and "with respect to the advertising or promotion" of cigarettes. *Id.* §1334(b); *see also Reilly*, 533 U.S. at 544. Neither Respondent nor the majority below disputed that Section 118950 is a "requirement or prohibition . . . imposed under State law" or that it is "based on smoking and health" within the

meaning of FCLAA. 15 U.S.C. §1334(b). *See Reynolds*, 112 Cal. App. 4th at 1389-91.

In *Reilly*, the United States Supreme Court provided its most recent and authoritative construction of FCLAA's "with respect to advertising or promotion" requirement. 533 U.S. at 546-50. Under *Reilly*, a state statute or regulation that "expressly target[s]" cigarette advertising or promotional activities and seeks to declare them unlawful under state law plainly satisfies the "with respect to advertising or promotion" requirement of FCLAA. *Id.* at 547.[3] Section 118950 is "with respect to advertising and promotion" because it "expressly target[s]" (*Reilly*, 533 U.S. at 547) a particular promotional activity: cigarette sampling.

B. FCLAA's Plain Language Establishes That The Federal Statute Preempts State Regulation Of Cigarette Sampling To Adult Smokers.

1. Courts Must Give Effect To The Text Of FCLAA.

As instructed by *Reilly*, in order to define the proper scope of preemption, courts are to look first to the language of the statute's express preemption provision. Statutory language is the primary indicator of congressional intent. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent"). In interpreting the text so as to effectuate Congressional intent, courts must give *each* word its *ordinary* meaning. There are two components to this analysis. First, every word and phrase in the preemption provision must be given meaning. Courts "must give meaning to each element of the pre-emption provision." *Reilly*, 533

[3]The United States Supreme Court acknowledged, however, that there may be statutes that "are with respect to the advertising or promotion" of cigarettes even though they do not expressly mention cigarettes. *See Reilly*, 533 U.S. at 547 (discussing analogy to similar issue in ERISA cases).

U.S. at 542 (citation omitted). Second, courts must presume that Congress intended the words to have their ordinary meaning. Courts "'must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.'" *Cipollone*, 505 U.S. at 521-22 (plurality opinion) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)).

In *Cipollone*, five Justices explicitly rejected the suggestion that a presumption against FCLAA preemption required it to be interpreted more "narrowly" than the plain meaning of its express preemption provision indicates. *Id.* at 544 (Scalia, J., with whom Thomas, J., joined) ("[O]ur job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning"); *id.* at 532 (Blackmun, J., with whom Kennedy and Souter, JJ., join) ("An interpreting court must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose") (citation and internal quotation marks omitted). Contrary to the Court of Appeal's assertion, *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057 (1994) does not require a different result. *See Reynolds*, 112 Cal. App. 4th at 1388. In *Mangini*, this Court held only that defining the proper scope of FCLAA preemption requires a court "'fairly'" but "'narrowly'" to "'construe the precise language of [section 1334(b)].'" 7 Cal. 4th at 1066-67 (quoting *Cipollone*, 505 U.S. at 523). Nothing in that case requires courts artificially to distort the natural meaning of FCLAA's words.[4]

---

[4] *Mangini* dealt only with the "based on smoking and health" prong of FCLAA preemption. Because neither Respondent nor the Court of Appeal relied upon this clause, this Court has no occasion in this case to address the question of whether *Mangini's* construction of that clause has been undermined by the United States Supreme Court's subsequent interpretation of the same language in *Reilly*. Of course, to the extent that there is any inconsistency between *Reilly* and *Mangini* on the construction of FCLAA, a federal statute, *Reilly* controls. (continued . . .)

Interpreting a statute by giving each word its ordinary meaning is not unique to FCLAA preemption in particular or preemption analysis generally. These same fundamental canons of statutory interpretation are applied by California courts in interpreting *all* statutes. *See Kavanaugh v. W. Sonoma County Union High Sch. Dist.*, 29 Cal. 4th 911, 919 (2003). It makes no difference whether the statute interpreted by the California court is itself a California statute or a federal statute. *See Washington Mut. Bank, FA v. Superior Court*, 75 Cal. App. 4th 773, 782 (1999) ("interpret[ing] the effect of the preemption language by focusing on the plain wording of the provision"); *Zunino v. Carleson*, 33 Cal. App. 3d 36, 40 (1973) (requiring words of the Social Security Act to be "interpreted in their ordinary acceptation and significance, and with the meaning commonly attributed to them").

Nor can the majority's reliance upon a "presumption against preemption" (*Reynolds*, 112 Cal. App. 4th at 1393) overcome FCLAA's plain language. As *Reilly* makes clear, any such presumption cannot be invoked *in disregard of the statutory text*. *Compare* 533 U.S. at 548-49 (rejecting a "distinction [that] cannot be squared with the language of the pre-emption provision"), *with id*. at 592-93 (Stevens, J., dissenting; relying on "presumption against preemption"); *see also Cipollone*, 505 U.S. at 523 (plurality); *id*. at 548-49 (Scalia, J., joined by Thomas, J., concurring in part, dissenting in part). Where (as here) Congress has included an *express* preemption provision, the statute "unquestionably *does* limit the power of States," and a court's "task is simply to ascertain the fair meaning" of the terms used. *Wisconsin Dep't of Rev. v. William Wrigley, Jr., Co.* 505 U.S. 214, 224 (1992); *see Egelhoff v. Egelhoff*,

---

(. . . continued)
"[D]ecisions of the United States Supreme Court are binding . . . on state courts when a federal question is involved, such as the constitutionality of an ordinance or construction of the federal Constitution or statutes." *Gen. Motors Corp. v. City of Los Angeles*, 35 Cal. App. 4th 1736, 1749 (1995) (citation, internal quotation marks and brackets omitted); *see also People v. Bradley*, 1 Cal. 3d 80, 86 (1969).

532 U.S. 141, 151-52 (2001) (presumption against preemption does not apply "where, as here, Congress has made clear its desire for pre-emption"). Thus, to the extent that there is a "presumption against preemption," it can only be invoked when there is residual *textual* ambiguity that would warrant use of such a canon of construction; it may not be invoked, as the court below did, simply to give effect to a sentiment that Congress' express preemption goes too far. *Cf. Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998) (where language is clear, there is "no reason . . . even to resort to the canons of construction that we use to resolve doubtful cases"). No presumption against preemption comes into play in this case because, as explained below, Section 118950 is clearly preempted by the plain language of FCLAA as construed by *Reilly*.

2. Cigarette Sampling Is A "Promotion."

Under any meaning of the term, cigarette sampling—the distribution of free samples to adult smokers—is a promotion. The only two federal courts that have analyzed what constitutes a "promotion" under FCLAA explicitly held that state statutes like Section 118950 that prohibit cigarette sampling are "with respect to the advertising or promotion" of cigarettes and therefore preempted. *Jones*, 272 F.3d at 1034; *see Rockwood*, 21 F. Supp. 2d at 420.

In *Jones*, as here, the only issue in dispute was whether cigarette sampling, banned by Iowa's Control Act,[5] constituted "advertising or promotion" within the meaning of FCLAA. *Jones*, 272 F.3d at 1034. The Eighth Circuit, as instructed by *Reilly*, "'beg[an] with the language of the statute.'" *Id.* (quoting *Reilly*, 533 U.S. at 536); *see id.* ("Because 'the pre-emptive scope of [FCLAA] is governed entirely by the express language in [Section 1334(b)],' we devote our attention to its precise terms") (quoting *Cipollone*,

[5]The Iowa law stated that tobacco companies and their agents "shall not give away cigarettes or tobacco products." IOWA CODE §142A.6(6)(a).

505 U.S. at 517) (citation omitted). The task of the court was "simply to discern whether the particular conduct proscribed by the Control Act naturally falls within the range of meaning ordinarily attributed to the term 'promotion.'" *Id.* at 1035.

The Eighth Circuit found that cigarette sampling constituted a promotion within the ordinary meaning of that term for several reasons, including that sampling is defined as a promotion by the FTC, the Surgeon General, and marketing textbooks. *Id*. at 135-36. In FCLAA, even as it limited state regulation of cigarette advertising or promotion, Congress specifically vested authority in the FTC to regulate and track cigarette advertising and promotional activities—the very subjects that are within FCLAA's preemptive reach. *See Reilly*, 533 U.S. at 548. Under FCLAA, the FTC was given the duty to investigate and to report to Congress on the "current practices and methods of cigarette *advertising and promotion*." 15 U.S.C. §1337(b)(1) (emphasis added).[6] The FTC itself defines sampling as one of the promotions that it tracked pursuant to FCLAA. *See Jones*, 272 F.3d at 1035 (FTC described the "'distribution of cigarette samples and specialty gift items' as 'sales promotion activities'") (citation omitted). It is well-established that courts generally "defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996); *see*

---

[6]The Court of Appeal was incorrect in stating that "the word 'promotion' appears only once in the FCLAA." *Reynolds*, 112 Cal. App. 4th at 1390. It appeared both in the preemption provision, and in the original delegation of authority to the FTC to track cigarette advertising and promotion. This requirement was removed only in 2000, as part of Congress' effort to reduce reporting obligations of various federal agencies. *See* Appellant's Supplemental Request for Judicial Notice filed with Appellant's Reply Brief ("Supp. RJN") Ex. A (Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104-66, §3003, 109 Stat. 734, 735 (1995)); Supp. RJN Ex. B (Rule III, clause 2 of H.R. Doc. No. 103-7 (1993)). The FTC, however, has voluntarily chosen to continue to collect and report on cigarette advertising and promotional practices.

generally Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837, 842-45 (1984). California courts follow the same rule. *See Dobbins v. San Diego County Civil Serv. Comm'n*, 75 Cal. App. 4th 125, 131 (1999) ("Generally, a court will defer to the construction given to an ambiguous statute or rule by the agency charged with its enforcement if that construction has a reasonable basis").

The FTC has used its authority under FCLAA to require cigarette companies, including Reynolds, to report to it on all promotions, including cigarette sampling. Pursuant to FCLAA's requirement that the FTC prepare an annual report on the tobacco industry's advertising and promotional activities, for decades the FTC has required through "compulsory process" tobacco companies to provide it with "special reports" delineating expenditures for specified types of advertising and promotion, including the distribution of free cigarettes. *See, e.g.*, Supp. RJN Ex. C at 1. To collect information on Reynolds' "expenditures on advertising, merchandizing, and promotion for cigarettes" (Supp. RJN Ex. D (FTC Letter dated Oct. 18, 2002)), the FTC issues an Order to File Special Report pursuant to Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. Section 46(b). *See, e.g., id.* (Order to File Special Report dated Oct. 11, 2002, attached to FTC letter dated Oct. 18, 2002). Among other things, the Order requires manufacturers to "[r]eport the total number of cigarettes given away in the United States . . . *includ[ing] all cigarettes distributed for free whether through sampling*, coupons for free product[s], 'buy 3 get 1 free' type offers, or otherwise, as long as such cigarettes were not reported as sold." *Id.* at 2 (emphasis added). The FTC's report to Congress reflects what the FTC considers to be the industry's advertising and promotional activities.

The Surgeon General, who evaluated tobacco company promotions in its 1994 report, likewise defined "promotion" to include cigarette sampling. *Jones*, 272 F.3d at 1035 (quoting U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PREVENTING TOBACCO USE AMONGST YOUNG PEOPLE: A REPORT OF SURGEON GENERAL

177 (1994) ("Promotional activities can take many forms. . . . Free samples do away with cost-sensitivity altogether and actually give consumers an opportunity to try something new")).

The Eighth Circuit also noted that within the marketing industry, "promotion" covers "'[a]ll forms of communication other than advertising that call attention to products and services by adding extra values toward the purchase[,] [i]nclud[ing] temporary discounts, allowances, premium offers, coupons, contests, sweepstakes, etc.'" 272 F.3d at 1036 (quoting DICTIONARY OF TERMINOLOGY 2, 20 (Univ. of Texas, Dep't of Advertising)). The Eighth Circuit therefore found it "abundantly clear" that activities such as promotional sampling and free giveaways "are promotions." *Id.* Similarly, in *Rockwood*, the District of Vermont found that an ordinance prohibiting free samples was preempted because it "directly affect[s] the advertisement and promotion of cigarettes." 21 F. Supp. 2d at 420.

The federal courts' (as well as the FTC's and the Surgeon General's) understanding of what constitutes a "promotion" corresponds perfectly with the usage of that term by academics, the California Legislature, and even the California Attorney General. Marketing textbooks describe product sampling as a "time-tested" method of "generating consumer trial and purchase of a product." Supp. RJN Ex. E at 65-66 (John A. Cleary, *Product Sampling, in* HANDBOOK OF SALES PROMOTION (Stanley M. Ulanoff ed., 1985)). The California Legislature itself acknowledged in its legislative findings that Section 118950 was aimed at "[t]obacco product advertising and promotion." HEALTH & SAFETY CODE §118950(a)(9). Even the Attorney General has admitted in the context of this very dispute that cigarette sampling is a promotion. *See* JA 194 (letter from Attorney General regarding enclosing Reynolds' distribution areas in opaque tents, stating "[w]e appreciate your making this important change in your marketing and *promotional* practices") (emphasis added).

C. This Court Should Defer To Unanimous Federal Precedent Interpreting "Promotion" To Include Cigarette Sampling.

By refusing to give due deference to the decisions of the only two federal courts to have interpreted "promotion" within the meaning of FCLAA, the majority below did not give sufficient weight to the federal courts' interpretation of the federal statute. This Court has long held that the decisions of lower federal courts on federal questions "are persuasive and entitled to great weight." *People v. Bradley*, 1 Cal. 3d 80, 86 (1969); *see also Etcheverry v. Tri Ag Serv. Inc.*, 22 Cal. 4th 316, 320 (2000) ("[D]ecisions of the lower federal courts . . . are persuasive and entitled to great weight"); *Dougherty v. Cal. Kettleman Oil Royalties, Inc.*, 9 Cal. 2d 58, 88 (1937) ("[I]n determining the interpretation and effect of federal statutes or regulations, this court is bound by the interpretation placed upon them by the federal courts"); *Stock v. Plunkett*, 181 Cal. 193, 195 (1919) (federal court decisions should be given "great weight in determining such federal question[s]"). The federal courts in *Jones* and *Rockwood* both considered the preemptive effect of FCLAA on state statutes barring cigarette sampling and came to the same conclusion: sampling is a "promotion" within the ordinary meaning of the word.

The majority below concluded that deference to federal authority is not required where "'lower federal precedents are divided or lacking'" or are not "'numerous and consistent.'" *Reynolds*, 112 Cal. App. 4th at 1393 (quoting *Etcheverry*, 22 Cal. 4th at 320-21). Contrary to the majority's reading of *Etcheverry*, however, that case does not imply that California courts are free to ignore federal decisions because of disagreement with the federal courts' analysis or because only a few federal courts have reached the issue. In fact, the case that *Etcheverry* cites for support of this proposition points only to instances where there is an actual disagreement among the federal courts or when only a single court has examined an issue as examples of where state courts may refuse to follow federal precedent. *See Conrad v. Bank of America*, 45 Cal.

App. 4th 133, 150 (1996) (citing *Rohr Aircraft Corp. v. County of San Diego*, 51 Ca. 2d 759, 764-65 (1959) (rejecting a single trial court decision) and *Alicia T. v. County of Los Angeles*, 222 Cal. App. 3d 869, 879 (1990) (resolving conflicting federal authorities)). In contrast, there is unanimity among the federal courts (including a federal Circuit Court of Appeals) that have examined the issue that FCLAA preempts state prohibition of cigarette sampling.

D. The Court Of Appeal Applied The Impermissible "Contextual" Analysis Adopted By The *Reilly* Dissent.

In rejecting unanimous federal precedent, the majority wrongly elevated the supposed "context" of FCLAA above the ordinary meaning of the statute's preemption provision. *See Reynolds*, 112 Cal. App. 4th at 139. The majority initially acknowledged the fundamental principles of preemption set out by the United States Supreme Court that analysis of FCLAA's preemption provision "'begins with the language of the statute'" (*Reynolds*, 112 Cal. App. 4th at 1387 (quoting *Reilly*, 533 U.S. at 542)), and that Congress' intent "primarily is discerned from the language of the pre-emption statute." *Id.* (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996)). Nonetheless, the Court of Appeal did not begin with the meaning of "promotion." In fact, it never offered a definition of "promotion" nor attempted to distinguish cigarette sampling from other activities that would qualify as promotions under its reading of FCLAA. Rather, the majority defined "promotion" only negatively, finding that "excluding nonsale distribution from the meaning of 'promotion' works no violence" on the larger purpose of FCLAA. *Id.* at 1389. It divined this fact from looking at the "context" of the preemption provision, including the "statutory framework" of FCLAA and its "structure and purpose." *Id.* at 1387 (internal quotation marks omitted). In so doing, Justice Ashmann-Gerst adopted the "contextual analysis" advocated by the *Reilly* dissent rather than following the textual analysis approved by the *Reilly* majority.

Reilly makes clear that vague notions about the "context" and "structure" of a provision cannot be invoked to defeat what the text plainly says. In *Reilly*, the Attorney General of Massachusetts argued that FCLAA preempts only those statutes that deal with the content of advertising and not its location. *Reilly*, 533 U.S. at 548. Although the Court noted the "surface appeal" of this position because FCLAA is structured so that "[t]he pre-emption provision immediately follows the section of the FCLAA that prescribes [the content of] warnings," it rejected the distinction between the content and location of advertising because it "cannot be squared with the language of the pre-emption provision." *Id.* The Court found that the "distinction between state regulation of the location as opposed to the content of cigarette advertising has no foundation *in the text* of the pre-emption provision." *Id.* at 551 (emphasis added).

Like Justice Stevens' dissent in *Reilly*, the majority here began not with the language of the federal statute but with a presumption *against* preemption. Rather than looking first to the language of FCLAA's preemption provision to "give meaning to each element" as required by *Reilly* (*id.* at 542), Justice Ashmann-Gerst instead turned immediately to the "context" of the preemption provision, the "statutory framework" of FCLAA and the "structure and purpose of the statute" as a whole in an attempt to gain a deeper "understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Reynolds*, 112 Cal. App. 4th at 1386-87 (quoting *Medtronic*, 518 U.S. at 485-86 (internal quotation marks omitted)). This is exactly the analytical approach taken by the *Reilly* dissent but rejected by the majority in that case.[7] *See Reilly*, 533 U.S. at 592

[7]This is also in stark contrast to the analysis the majority applied to Section 118950 in order to understand the legislative intent behind that statute. There, the majority purported to focus on "the words of the statute" and to attempt to "'giv[e] to the language its usual, ordinary import and [to] accord[] significance, if possible, to every word, phrase and sentence.'" *Id.* at 1394 (quoting *Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n*, 43 Cal. 3d 1379, 1386-87 (1987)).

(Stevens, J., with whom Ginsburg, Breyer and Souter, JJ., join, dissenting).

E. The Court Of Appeal Rendered The Term "Promotion" In FCLAA Surplusage.

By improperly disregarding the language of FCLAA's preemption provision in deference to its own subjective notion of the "context" of the statute, the majority entirely avoided giving any independent meaning to "promotion," rendering its presence in the preemption provision mere surplusage. Rather than determining what Congress meant when it amended FCLAA in 1969 to preempt local regulations of "promotion" as well as "advertising," the majority found only that "Congress did not make the meaning of 'promotion' clear." *Reynolds*, 112 Cal. App. 4th at 1390. Instead of applying the ordinary meaning of the term as used by the FTC, the Surgeon General, marketing textbooks, and the federal courts (as well as the California Legislature and the Attorney General), the majority opinion cavalierly wrote the term "promotion" out of the federal statute, stating that it would not "let 'promotion' be the tail that wags the dog." *Id.*

The implication of this refusal to define "promotion" (and in particular its failure to apply the ordinary meaning of the term) is that the term's 1969 addition to FCLAA's preemption provision serves no purpose. *See id*. at 1412 (Doi Todd, J., dissenting) ("I decline to adopt the conclusion implicit in the majority's opinion that the term 'promotion' has no independent meaning apart from the term 'advertising'"). It is a settled rule of statutory interpretation that courts must avoid rendering particular terms meaningless or mere surplusage. *See, e.g.*, *City of San Jose v. Superior Court*, 5 Cal. 4th 47, 55 (1993) ("In using two quite different terms . . . the Legislature presumably intended to refer to two distinct concepts. . . . We ordinarily reject interpretations that render particular terms of a statute mere surplusage, instead giving every

word some significance"); *In re Marriage of Duffy*, 91 Cal. App. 4th 923, 939 (2001).

There is no principled basis to distinguish between cigarette sampling and other cigarette promotions, the regulation of which would be preempted by FCLAA. Although the majority did not define "promotions," any and all reasonable definitions include cigarette sampling. For example, the Attorney General claimed below that "promotions" relate only to "the conveyance of information and/or the dissemination of . . . images about cigarettes through means other than traditional advertising media . . . includ[ing] novelty items (such as logo-bearing key-chains . . .) and sponsorships (such as the NASCAR Winston Cup [Series])." Respondent's Br. at 26 (footnote omitted). But, as noted in Justice Doi Todd's dissent, such a distinction does little more than "highlight the problem with excluding cigarette giveaways from any reasonable interpretation of the term 'promotion.'" *Reynolds*, 112 Cal. App. 4th at 1413 (Doi Todd, J., dissenting). The problem is that:

> each is an activity calculated to induce the consumer to purchase cigarettes in the future, which is precisely what a promotion is designed to do. Indeed, giving away a free cigarette is an effective type of promotion; it informs the recipient of the product's qualities far more instantly and accurately than any other form of advertisement or communication. (*Id.* (Doi Todd, J., dissenting) (citation omitted))

Cigarette sampling accordingly satisfies even the Attorney General's supposedly "narrow" definition of "promotion." Because sampling permits potential customers directly to evaluate a product without cost, it is perhaps the *most accurate* and *purest* method of conveying product information. Rather than merely conveying product claims and imagery like traditional methods of advertising, sampling conveys the actual characteristics of the product itself. Being able actually to try a product unquestionably conveys more information about the product to a potential consumer than do the novelty items

and sports sponsorships that Respondent acknowledged constitute promotions within the meaning of FCLAA.

F. FCLAA Preempts State Regulation Of Cigarette "Advertising Or Promotion" While Permitting States To Regulate The Sale And Use Of Cigarettes.

In order to bolster its improper "contextual" analysis of FCLAA, the majority incorrectly assumed that finding FCLAA to preempt regulation of cigarette sampling would dangerously limit the power of states to regulate tobacco use. For example, the majority complained that finding Section 118950 to be preempted would result in the "paradoxical situation that a state could prohibit the sale but not giveaway of cigarettes to minors." *Reynolds*, 112 Cal. App. 4th at 1390. This misstates both Reynolds' position and binding United States Supreme Court precedent.[8] In enacting FCLAA, Congress intended to preempt state regulation of cigarette advertising and promotion, while permitting the states to retain their traditional police powers to regulate the sale and use of cigarettes. *Reilly*, 533 U.S. at 552. The Supreme Court in *Reilly* observed that while FCLAA explicitly preempts state regulations of cigarette "'*advertising or promotion*,'" it "does not foreclose all state regulation of conduct as it relates to *the sale or use of cigarettes*." *Id.* (emphases added); *see also* RJN Ex. B at 12 (S. Rep. No. 91 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663) (distinguishing cigarette advertising from the taxation, sale or use of cigarettes); *Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 64 (1st Cir. 1997) (citing Senate Report).[9]

---

[8]Reynolds has specifically disclaimed any argument that finding Section 118950 preempted would allow the nonsale distribution of cigarettes to minors. Appellant's Reply Br. at 13-15.

[9]FCLAA's express preemption provision does not impinge upon the traditional police power of States to adopt general regulations concerning promotional practices for products, so long as the application of those regulations to cigarettes is not "based on smoking and health." For example, because generally applicable zoning (continued . . .)

Every federal court to consider the issue (including the United States Supreme Court) has found that despite FCLAA's preemption of regulations with regards to promotion, states retain the right to prohibit all distribution of cigarettes to minors. *See Reilly*, 533 U.S. at 552 (noting that "[i]n Massachusetts, it is illegal to sell or distribute tobacco products to persons under the age of 18"); *Jones* 272 F.3d at 1038 (finding that giving away cigarettes to minors would be prohibited by Iowa law); *Rockwood*, 21 F. Supp. 2d at 421. Any distribution of cigarettes to minors in California would remain prohibited by Penal Code Section 308, which would be unaffected by FCLAA.[10] *See Reilly*, 533 U.S. at 552. In addition, States may continue to prohibit conduct that constitutes inchoate offenses relating to criminal distribution to minors. *See Reilly*, 533 U.S. at 552 ("Having prohibited the sale and distribution of tobacco products to minors, the State may prohibit common inchoate offenses, that attach to criminal conduct, such as solicitation, conspiracy, and attempt").

The majority wrongly relied on language in *Reilly* (drawn from the Senate Report) to argue that, in addition to, e.g., prohibitions on sales to minors, "similar police regulations" would not be

---

(. . . continued)
requirements are justified by "state interests in traffic and esthetics" and because there is nothing about their application to cigarette advertising that is based on smoking and health, they are not preempted by FCLAA. *Reilly*, 533 U.S. at 551-52; *cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992) (rejecting as "utterly irrational" the argument that "only state laws specifically addressed to the [challenged] industry are pre-empted," and that preemption should "impose[] no constraints on laws of general applicability"; court must also consider whether the "particularized application of a general statute" is preempted). Thus, California may decide to prohibit all product sampling in the State, but it cannot (as here) adopt a tobacco-specific ban on promotional sampling.

[10]Under the Synar Amendment (42 U.S.C. Section 300x-26) states can and must take steps to prevent the sale or distribution of cigarettes to minors. *See Reynolds*, 112 Cal. App. 4th at 1389-90. Nothing in the Synar Amendment statute authorizes states to regulate *promotions* involving solely adults.

preempted. *Reynolds*, 112 Cal. App. 4th at 1389 (citation and internal quotation marks omitted). The majority overlooked the clear import of the quoted language, which refers to police regulations that are "similar" in the sense that, like a prohibition on sales to minors, *they do not regulate* "*advertising or promotion*." That, of course, is the precise problem here: in contrast to Penal Code Section 308, which generally regulates all cigarette distributions to minors, Section 118950 explicitly regulates only *promotional* distribution of cigarettes to adults. Indeed, as applied here, it regulates the distribution of sample cigarettes to *adults* who were confirmed to be *current smokers* in a specially constructed *adult-only area*. That brings it within the plain language of FCLAA that preempts state requirements regarding the advertising or promotion of cigarettes.

II.

REYNOLDS' DISTRIBUTIONS WERE ALL WITHIN THE SAFE HARBOR PROVISION OF SECTION 118950.

A. The Statute Allows The Distribution Of Cigarettes Within A Separate, Age-Restricted Area.

Reynolds fully complied with Section 118950. The statute expressly allows distribution of free cigarettes in "any public building, park, playground, sidewalk, street, or other public grounds leased for private functions where minors are denied access by a peace officer or licensed security guard on the premises." HEALTH & SAFETY CODE §118950(f). Reynolds' actions here fall within both the plain language and the purpose of the statute. There is no dispute that all of the distributions at issue took place within a separate area to which minors were denied access. JA 111 ¶9, 112 ¶18, 113 ¶27, 114 ¶37, 115 ¶47, 116-17 ¶¶56, 65; 1609 ("It is undisputed that Reynolds maintained a separate, age-restricted area, at all seven events described in the complaint . . ."). At each event, Reynolds, through its agents, contracted for the right to set up an age-restricted booth or tent in which to conduct sampling. JA 120

¶5, 122 ¶16, 124 ¶28, 126 ¶40, 128 ¶51, 129 ¶63, 131 ¶74. Reynolds ensured that minors were prevented from entering these areas[11] by having licensed security guards on the premises. JA 121 ¶¶8-9, 123 ¶¶19-20, 124-25 ¶¶31-32, 126-27 ¶¶43-44, 128 ¶¶54-55, 130 ¶¶66-67, 131-32 ¶¶77-78. More than just complying with the letter of the statute, Reynolds' promotional activities therefore also vindicated Section 118950's goal of "keeping children from beginning to use tobacco products." HEALTH & SAFETY CODE §118950(a)(10)-(11). Reynolds' exclusion of minors from the separate distribution area at each event was entirely successful. There was no evidence or even any allegation by the Attorney General that anyone under 21 gained access to a promotional tent or otherwise received promotional product.

The legislative history makes clear that Section 118950 allows the distribution of cigarettes within tents or booths on public grounds. "The language about public facilities leased for private functions suggests that booths, tents or barricaded areas may be used for sampling if there is a uniformed guard present." RJN Ex. F at 2 (S.B. 1100, Senate Third Reading (as amended Sept. 9, 1991)). Booths, tents or barricaded areas would not be necessary or even possible had the Legislature intended to require the exclusion of minors from an entire public facility, such as the Los Angeles County Fairgrounds.

Moreover, even the additional items of "legislative history" entered into evidence over Reynolds' objection and relied upon by the majority support a finding that the Legislature intended to allow the promotional distribution of cigarettes in age-restricted areas. Based on declarations signed by Senator Marian Bergeron, the

---

[11]Reynolds went far beyond the requirements of Section 118950 of limiting access to the distribution area to those under 18 by denying entry to anyone who was not both *at least 21 years of age* and a *current smoker*. JA 121 ¶¶9-10. In addition, although not required by the statute, participants went through multiple checks before gaining entrance to the tent. JA 122 ¶17, 123 ¶20.

author of Section 118950, and a California Medical Association lobbyist, the Attorney General claimed—and the majority agreed—that an amendment containing language approving "the possibility that a *portion* of a public venue could be leased for a private event" was considered and rejected by the Legislature. *See* Respondent's Br. at 7 nn.6-7 (citing JA 573-74, 578 ¶¶2-4, 581-82); *Reynolds*, 112 Cal. App. 4th at 1396 (finding that "the Legislature rejected the proposed amendment"). The majority's reading of the chronology of events leading to the passage of Section 118950 is both wrong and irrelevant. It is irrelevant because, even assuming that language *specifically* addressing a "portion" of a public venue was deliberately omitted by the Legislature, that does not change the fact that the language that *was* adopted is ample to cover this case.

The majority's reading of the chronology of events is, in any event, incorrect, as the Legislature never rejected the amendment containing language addressing a "portion" of public grounds. The declarations submitted by the Attorney General make clear that the original version of Section 118950 did not have any safe harbor provision. JA 578 ¶2, 581-82. During discussion of the bill that became Section 118950, "[p]rompted by several questions" raised by various members of the Assembly Ways and Means Committee, one member "suggested that public areas where minors are denied access should be exempt from the restrictions of the Bill." JA 578 ¶2. That committee member therefore submitted to the bill's author, Senator Marian Bergeron, a proposed amendment "'to correct this problem'" and allow distributions in age-restricted areas. JA 578 ¶3, 581-82. Before Senator Bergeron submitted the proposed amendment to the committee to vote on, and outside the presence of the legislators who later would vote for it, the amendment was modified by a paid lobbyist for the California Medical Association.[12] JA 583-88. The

[12]The lobbyist's changes to the amendment are neither relevant to an inquiry into legislative intent nor a proper subject for judicial notice. Declarations like the ones submitted by the Attorney General and relied upon by the majority are only admissible if they "reiterate the (continued . . .)

amendment as modified ultimately became Section 118950(f), the safe harbor provision. The other committee members apparently never saw the original version of the amendment nor opted for the lobbyist's changes over the original version. In other words, the evidence shows only that several committee members wanted "public areas where minors are denied access [to] be exempt" and Subsection (f) was added to Section 118950 specifically in order to address that concern. JA 578 ¶2. This chronology demonstrates that the Legislature intended to allow distributions in age-restricted areas.

B. Section 118950's Safe Harbor Provision Does Not Require An Entire "Public Event" To Be Age-Restricted.

The Superior Court and the Attorney General on the one hand, and the Court of Appeal on the other, offered different interpretations of the size and shape of the public grounds that must be age-restricted in order to fall within the safe harbor provision of Subsection (f). Neither of these interpretations square with the language of that provision or with common sense. The Superior Court apparently assumed that in order to fall within the exception defined by Section 118950(f), the entire "public building, park, playground, sidewalk, street, or other public grounds" on which an event took place and at which the distribution occurred must be age-restricted. *See* JA 1604, 1609 ("The problem, of course, is that these restricted areas were on public property into which the general

---

(. . . continued)
discussion and events *which transpired in the Legislature*." *Cal. Teachers Ass'n v. San Diego Cmty. Coll. Dist.*, 28 Cal. 3d 692, 701 (1981) (emphasis added). Because the review and editing of the amendment here took place outside the Legislature by a paid lobbyist and were never considered by the committee, those changes are inadmissible and irrelevant to a determination regarding the Legislature's intent in including the amendment itself in the bill. Courts "do not consider the motives or understandings of individual legislators" (*id.* at 699-700 (internal quotation marks omitted)), and in no case has a court looked to the motive of a lobbyist in order to determine legislative intent.

public was invited for various public events . . .”). On appeal, Reynolds noted that this interpretation would yield absurd results and render certain terms within the exception meaningless:

> Under this interpretation, nonsale distributions on public streets, for instance, would require restricting minors *from the entire street regardless of how small the distribution area itself is*. For example, the Sunset Junction Festival (one of the events at which cigarette distributions occurred) took place on “Sunset Boulevard (between Fountain and Edgecliff) in Los Angeles.” JA 26 ¶30. This encompasses approximately seven city blocks. Under the lower court’s interpretation, in order lawfully to engage in the nonsale distribution of cigarettes, Reynolds would have had to lease and exclude minors from all of Sunset Boulevard, from the ocean to downtown Los Angeles—*a distance of over twenty miles*. (Appellant’s Opening Br. at 26)

The Attorney General acknowledged and endorsed this result, admitting that “[i]f the geographic characteristics of venues like Sunset Junction make it impossible for Reynolds to give out free samples without violating Section 118950, it would simply have to refrain from sampling at that event.” Resp. Br. at 8.

The majority obviously disagreed with the Superior Court’s and the Attorney General’s interpretation of the safe harbor provision. *See Reynolds*, 112 Cal. App. 4th at 1396. It posited instead an entirely different interpretation, holding that “[r]easonably construed in the context of this case, leased public grounds is functionally coterminous with the six events within which R.J. Reynolds was distributing free cigarettes.” *Id.* As a result, the majority found that “Reynolds was not permitted to offer samples unless [for example] the approximately seven blocks of the Sunset Junction Festival was . . . age-restricted.” *Id.* Although it purportedly rejected a reading of the safe harbor provision allowing distributions on “‘portions’ of public grounds” (*id*. at 1395), the majority’s interpretation, like Reynolds’ and unlike the Superior Court’s or the Attorney General’s, does allow one to lease only a portion of the public grounds upon which the distribution is to take

place, so long as that portion includes the entire area in which the event is held. The majority opted simply to require one to lease a *larger* portion of the public grounds than Reynolds did at any of the events at issue. As noted by Justice Doi Todd, because very few if any "public events" are age-restricted, under the majority's interpretation of the safe harbor provision, "the effect of section 118950 is to ban cigarette giveaways to both adults and minors in virtually every public area." *Id*. at 1414 (Doi Todd, J., dissenting).

This reading of the safe harbor provision is textually infirm. In order to avoid the unreasonable consequences inherent in the Superior Court's and the Attorney General's interpretation, the majority offered one that simply does not square with the language of the safe harbor provision. Nowhere in Subsection (f) does it state that one must exclude minors from public events surrounding the age-restricted grounds. The text of the provision makes clear that the relevant "public grounds" is defined, not by the larger event in which cigarette distribution takes place, but rather by the particular "private functions where minors are denied access." HEALTH & SAFETY CODE §118950(f) (emphasis added).

Nor can the majority's re-writing of the safe harbor provision be salvaged through a supposed "narrow" reading of the provision that is purportedly required "to prevent children from becoming addicted to cigarettes." *Id.* at 1395. First, there is simply no evidence that any minor—or even any non-smoker—received free cigarettes at any of the events. Second, there is no evidence to support the majority's invented rationale that allowing distributions within age-restricted areas would result in "more immediate opportunities for adults to pass samples on to children." *Id.*

III.

THE $14.8 MILLION FINE IS GROSSLY DISPROPORTIONAL TO ANY CULPABILITY OF REYNOLDS AND ANY HARM CAUSED BY ITS CONDUCT.

A. The Federal And State Constitutions Require A Critical Analysis Of The Proportionality Of The Fine Imposed.

The $14.8 million fine imposed below violates federal and state constitutional protections against excessive punishment. The Eighth Amendment to the United States Constitution prohibits the imposition of "excessive fines." U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"). The Due Process Clause of the Fourteenth Amendment extends the reach of the Eighth Amendment's prohibition on excessive fines to the states and independently prohibits states from imposing "'grossly excessive'" punishments. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001); *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 568 (1996) (stating that a "'grossly excessive'" award "enter[s] the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment"); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993).

California's Constitution likewise provides substantive checks on government power to act unfairly or oppressively. CAL. CONST. art. I, §17 ("Cruel or unusual punishment may not be inflicted or excessive fines imposed"); *id.* §7 ("A person may not be deprived of life, liberty, or property without due process of law . . ."). These constitutional protections against governmental infringement on property rights require that statutory penalties be "reasonable and proper" and not "arbitrary and oppressive." *Hale v. Morgan*, 22 Cal. 3d 388, 399 (1978).

Under both the Excessive Fines Clause and the Due Process Clause of the United States Constitution, a fine is unconstitutional if it is "grossly disproportional to the gravity of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 337 (1998)

(analyzing criminal forfeiture under excessive fines clause); *Cooper Indus.*, 532 U.S. at 433-34 (analyzing civil penalties under due process clause). The amount of the fine "must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334.[13] The standard is similar under the California Constitution in that the penalty must be "reasonable and proper" and not "arbitrary or oppressive." *Hale*, 22 Cal. 3d at 399.

In determining whether the constitutional boundary has been crossed, courts look to the same general criteria: (1) "the degree of the defendant's reprehensibility or culpability"; (2) "the relationship between the penalty and the harm to the victim caused by the defendant's actions"; and (3) and a comparison with "the sanctions imposed in other cases for comparable misconduct." *Cooper Indus.*, 532 U.S. at 435; *see also Hale*, 22 Cal. 3d at 399 (analyzing culpability of defendant's conduct); *id.* at 405 (comparing penalty's relationship with the harm to the victim); *id.* at 400-03 (comparing penalty imposed to penalties authorized by similar California and out-of-state statutes). In addition, courts also assess the particular penalty in light of the need to deter defendants from undertaking similar actions again. *See BMW*, 517 U.S. at 568; *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509, 535 (1984) (assessing reasonableness of penalty in light of "the deterrent effect sought by the Legislature").

Here, the majority erred in refusing to consider two key factors: (1) Reynolds' good faith belief that its conduct was legal and (2) the gravity of the harm (if any) caused by the underlying conduct. As a result of these two errors, the majority found that the multimillion

---

[13]In *Bajakajian*, the respondent was convicted of attempting to exit the country without reporting that he was carrying more than $10,000 in currency—a violation of federal law. 524 U.S. at 324. As a result, he was forced to forfeit the entirety of the $357,144 that he was transporting. *Id.* at 325-26. The United States Supreme Court found this forfeiture to be an unconstitutionally excessive fine. *Id.* at 337.

dollar penalty was proportional to the gravity of the offense even though Reynolds had a good faith and reasonable belief that its distributions were allowed under the safe harbor provision of Section 118950(f) (which the Court of Appeal interpreted as an issue of first impression in this case), and even though no cigarettes were distributed to a single minor or nonsmoker.

B. Reynolds' Good Faith Belief That Its Conduct Was Lawful Is Relevant To The Degree Of Culpability.

First, the majority erred in refusing to take into account Reynolds' good faith belief that it was complying with the requirements of the safe harbor provision. Courts rightfully distinguish between wrongful actions taken in good faith from actions that are intentional or malicious.[14] *See People v. Nat'l Ass'n of Realtors*, 155 Cal. App. 3d 578, 588 (1984) ("Here the [trial] court erroneously believed the penalty was to punish for activities reasonably believed to be lawful and which were committed without any predatory or malicious motive"). For example, in *BMW*, the United States Supreme Court found the defendant's failure to disclose minor repairs to an automobile sold as new, such as repainting, was not "sufficiently reprehensible to justify a $2 million award of punitive damages" (517 U.S. at 578) where "a corporate executive could reasonably interpret the disclosure requirements as establishing safe harbors." *Id.* This Court also has indicated that defendants' good faith belief "that they were not violating [the statute]" could "make the imposition of statutory penalties a violation of defendants' due process rights." *People ex rel. Lungren v. Superior Court*, 14 Cal. 4th 294, 314 n.8 (1996).

---

[14]The United States Supreme Court has stated that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *See BMW*, 517 U.S. at 575; *see also United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197 ("The culpability of the offender should be examined specifically, rather than examining the gravity of the crime in the abstract"), *amended by* 172 F.3d 689 (9th Cir. 1999).

This Court as well as three other Second District appellate panels have held that "courts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions." *Lusardi Constr. Co. v. Aubry*, 1 Cal. 4th 976, 996-97 (1992). In *No Oil, Inc. v. Occidental Petroleum Corp.*, 50 Cal. App. 3d 8, 30 (1975), the court held that penalties could not be imposed against the defendant oil company where, although the company's drilling was ultimately determined to be unlawful, the company had a good faith belief in the lawfulness of its conduct at the time. The court found a "good faith belief reasonably entertained" as to the lawfulness of a defendant's conduct is a defense against the imposition of penalties. *Id.* Moreover, mere knowledge that the conduct "might ultimately be held to be unlawful" does not render a defendant "culpable to a degree justifying the imposition of a penalty." *Id*. at 31.

Similarly, in *South Coast Regional Commission v. Gordon*, 84 Cal. App. 3d 612 (1978), the Commission filed an action against a homeowner who built a house without first obtaining a permit. *Id.* at 615. After the court held that the homeowner's failure to present his exemption claim to the Commission precluded his reliance on it, the Commission sought civil penalties. *Id.* The court remanded the matter for a determination of whether the homeowner's failure to obtain a permit violated the 1972 Act and "whether he did so in a good faith belief reasonably entertained of the legality of his conduct" (*id.* at 617), reasoning that the defendant could not be subject to penalties where he held a good faith and reasonable belief in the legality of his conduct. *Id.* at 618 n.7.

Finally, in *Whaler's Village Club v. California Coastal Commission*, 173 Cal. App. 3d 240 (1985), a homeowner association built a revetment to protect against storm erosion without a permit as required by the California Coastal Act. *Id*. at 249. In reliance on *No Oil* and *South Coast*, the Second District panel remanded the matter for a determination of whether the defendant had a "'good faith

belief reasonably entertained of the legality of [its] conduct.'" *Id.* at 263 (quoting *S. Coast Regional Comm'n*, 84 Cal. App. 3d at 617).

As in those cases, the evidence shows here that Reynolds had a reasonable and good faith belief that its activities were lawful. Reynolds went to great lengths to ensure that its promotional sampling activities exceeded the requirements of Section 118950. Reynolds contracted for and established separate areas for its promotional activities. Its agents ensured that only current smokers 21 years of age or older participated in the promotion. Reynolds hired licensed security guards to exclude nonsmokers and those under the age of 21 from the distribution area. Reynolds even digitally photographed each participant's government-issued identification in order to ensure that only eligible adults participated. All of these expensive efforts demonstrate Reynolds' good faith in complying with Section 118950 and ensuring that no minor received any promotional materials. There was no evidence that even a single minor received any promotional cigarettes at any of the six events. In light of the State's interest in preventing distributions to minors, it was reasonable for Reynolds to interpret Section 118950's exception as permitting distributions where Reynolds contracted for and established separate distribution areas where licensed security guards prevented minors from entering.[15]

Further evidence of Reynolds' good faith and lack of wrongful intent is the cessation of promotional activities as soon as the Attorney General indicated its belief that the distribution of free

[15]Nor was Reynolds' conduct so egregious that it must have known that it was unlawful. Indeed, promotional sampling and the procedures that the tobacco companies are to use in conducting such promotions (including providing for a separate adults-only facility at public events) are the product of direct negotiations with the Attorneys General of various states including California. These procedures, which exactly track those used by Reynolds at all of the events at issue, are set out explicitly in the Master Settlement Agreement ("MSA"). *See* JA 1236 (excerpts from the MSA).

samples violated Section 118950.[16] JA 193-96. Courts view a delay in a defendant's cessation of unlawful activity as indicative of an intentional violation. *See City & County of San Francisco v. Sainez*, 77 Cal. App. 4th 1302, 1316 (2000) (finding the amount proportional to the "'flagrant disregard'" of the violations because "despite warning . . . defendants delayed, failed to respond and had made only partial progress even by the time of trial") (citation omitted). In contrast, immediate cessation of activities would be indicative of an honest mistake or a reasonable difference of opinion. Finally, far from hiding its activities (which could demonstrate knowledge that its actions were unlawful) Reynolds notified the State of the location and date of its promotional distributions. JA 1264-67. Again, this is consistent with a good faith belief in the lawfulness of the promotions.

In conflict with United States Supreme Court and California Supreme Court authority, the majority refused to take into account Reynolds' good faith belief in the lawfulness of its actions in evaluating the proportionality of a $14.8 million fine. In the Superior Court, Reynolds presented undisputed evidence regarding its reasonable and good faith efforts to conform its promotional activities to the requirements of Section 118950's safe harbor exception. JA 1218-19. Although the Superior Court determined that a factual dispute existed regarding Reynolds' good faith belief, it *granted* summary judgment in favor of the Attorney General, who was the moving party on the penalty issue. JA 1611-15. The majority ignored the Superior Court's procedural error,[17] instead

---

[16]After the Attorney General took the position that Section 118950 prohibited the distribution of coupons as well, Reynolds immediately also ceased distributing discount coupons on public grounds—an activity that the lower court subsequently determined to be lawful. *See* JA 193-96, 1609.

[17]The trial court's finding that a factual dispute existed required it to deny, rather than grant, the Attorney General's motion for summary judgment. *See Hale*, 22 Cal. 3d at 401; *Waterman Convalescent Hosp., Inc. v. Jurupa Cmty. Servs. Dist.*, 53 Cal. App. 4th 1550, 1556 (1996); (continued . . .)

finding that Reynolds' claims of good faith were irrelevant to the question of culpability because "'ignorance of a law is not a defense to a charge of its violation.'" *Reynolds*, 112 Cal. App. 4th at 1399 (quoting *Hale*, 22 Cal. 3d at 396). While true that ignorance is typically not a *defense* to the substantive violation, a defendant's good faith belief that its conduct is lawful does render a defendant *less culpable*, at least when evaluating the constitutionality of the quantum of the penalty imposed.

While the majority explicitly refused to consider Reynolds' good faith in evaluating its culpability, the majority *presumed that Reynolds acted in bad faith* in assessing other factors relevant to the proportionality inquiry. For example, in finding that the fine "is mandatory in amount, but it was not unlimited in duration" (*id.* at 1401 (citing *Sainez*, 77 Cal. App. 4th at 1312)), the majority stated that "Reynolds always had the power to stop distributing free cigarettes in a manner prohibited" by the statute. *Id.* at 1402. Of course, the power to stop violating a statute is meaningless in the context of one who reasonably and in good faith believes he is following the law. Because Reynolds assumed its conduct to be lawful, it had no reason to stop distributing free cigarettes within the age-restricted areas. Similarly, the majority stated that Reynolds "chose to take a business risk by flirting with the boundaries of section 118950." *Id.* There is no support for this claim in the evidence. To the contrary, the undisputed evidence shows that Reynolds conducted sampling so as to conform with the limitations on sampling set out in the MSA and express safe harbor provision of the statute.

(. . . continued)
Schuhart v. Pinguelo, 230 Cal. App. 3d 1599, 1610 (1991).

C. Reynolds' Conduct Caused Little Or No Harm.

1. The Size Of The Penalty Must Be Considered In Relation To The Harm Actually Caused.

Any comparison of "the relationship between the penalty and the harm to the victim caused by the defendant's actions" (*Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001)), demonstrates that the $14.8 million penalty greatly exceeds any possible harm resulting from Reynolds' promotional sampling. In fact, it is difficult to discern what harm could have resulted from Reynolds' distribution of free cigarettes to adult smokers within an adult-only facility. Reynolds did not distribute any cigarettes to any minor, and after Reynolds changed its distribution facility from a booth to a tent at the Attorney General's insistence, minors could not even see or hear the promotional distributions. *See* JA 119-33, 190-91, 194-95, 1609. The promotional sampling did not result in any new smokers, as only current adult smokers were allowed to receive Reynolds' samples. JA 120-21 ¶7, 122 ¶18, 124 ¶30, 126 ¶42, 131 ¶76. Reynolds' promotional activities did not even result in lost tax revenue to the State, since Reynolds paid the taxes on the promotional cigarettes. *See* JA 1220. The very procedures for conducting promotional sampling at issue in this case were negotiated *with the Attorney General* as part of the MSA. *See* discussion at 36 n.15, *supra*. A $14.8 million fine is "grossly excessive" when there is no evidence of *any* harm caused by the conduct at issue.

The lower court found that a $14.8 million penalty was not grossly excessive on the ground that a violation of Section 118950 is "beyond that which is compensable" because the statute sought to prevent "death and disease caused by smoking." JA 1605, 1613 (citation and internal quotation marks omitted). Such circular reasoning improperly insulates Section 118950 (or any health related statute) from constitutional limitations, and ignores that both the federal and state constitutions prohibit penalties that are grossly excessive in light of the *actual or potential harm caused by the conduct at issue*—not the harm sought to be prevented by a statute.

Here, such harm would have to be measured as the harm caused by Reynolds' supposed failure to comply with the restrictions of the statute's safe harbor provision. However, the Attorney General submitted no evidence that as a result of Reynolds' setting up age-restricted promotional distribution areas on portions of public grounds, any minor received or could have received any of the promotional cigarettes, nor even that any adult smoker took any action as a result of the promotion other than the desired one of switching cigarette brands.

The majority rejected the lower court's description of the supposed harm caused by Reynolds, and instead redefined the harm to be the violation of the statute per se: "the harm at issue was sampling in violation of the statute, not the unknown health consequences for each individual who received a sample." *Reynolds*, 112 Cal. App. 4th at 1399. Because the penalty was calculated by reference to the number of statutory violations, the majority concluded that there was a "close relationship between the harm and the size of the penalty." *Id.*

The United States Supreme Court has held, however, that the harm to be considered under *Cooper* and *United States v. Bajakajian*, 524 U.S. 321 (1998) is *not* the abstract harm to the State that occurs when a statute is violated, but the actual or potential harm that the statute is designed to prevent. *See Bajakajian*, 524 U.S. at 334 (the fine must "bear some relationship to the gravity of the offense that it is designed to punish"); *Cooper Indus., Inc.*, 532 U.S. at 435 (considering "harm to the victim caused by the defendant's actions"). Thus, when a defendant's unlawful conduct results in more serious harm, a more substantial fine is constitutionally permissible. Conversely, the imposition of a multi-million dollar fine where the defendant's conduct caused little or no harm constitutes an unconstitutionally excessive fine. *See, e.g., BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 578 (1996).

2. The Size Of The Fine In This Case Is The Result Of The Attorney General's Delay In Notifying Reynolds Of Its Interpretation Of Section 118950.

The majority's decision to consider the harm to be the violation of Section 118950 itself is particular inappropriate in this case, where Reynolds acted openly and in good faith for years before the Attorney General sued. In other words, the magnitude of the fine results solely because the statute imposes penalties based on each distribution and the Attorney General did not bring an action until thousands of packages of cigarettes had already been distributed. Reynolds had been conducting and informing the State of California of its promotional sampling within age-restricted areas at Pomona since at least 1995. JA 1232 ¶8, 1264-67. In fact, Reynolds' ability to conduct promotional sampling in age-restricted areas was a negotiated part of the MSA, and it was the Attorney General who requested that Reynolds conduct those promotional activities within an enclosed tent. *See* discussion at 5-6, 36 n.15, *supra*. When the Attorney General informed Reynolds of its position that promotional sampling at Pomona might violate Section 118950 in November 1999, Reynolds immediately ceased its distributions. JA 193-96.

Courts look to a party's responsibility for the accumulation of fines in determining whether a penalty is proportional to the defendant's conduct. In *Walsh v. Kirby*, 13 Cal. 3d 95 (1974), this Court invalidated a fine that accumulated because of the Attorney General's delay in bringing an action. In *Walsh*, the owner of a liquor store had been fined for selling distilled spirits at less than established minimum retail prices in violation of Business and Professions Code Section 24755. The store owner had knowingly violated the statute on ten separate occasions, resulting in a fine of $9,250. *Id.* at 99. Nonetheless, the Court disallowed the fine because it resulted from the government's practice of accumulating "different but essentially identical violation[s], before it filed its accusation charging the licensee with the whole series of violations and assessing concomitant cumulative penalties." *Id.* at 98. The

Court found that such a practice went against the legislative intent behind the penalty clause of the statute, which "in character intended to serve as a notice or warning as it provides a relatively light penalty for the initial violation with the threat of more severe penalties should the licensee thereafter fail to conform." *Id.* at 102. *Walsh* therefore concluded that $9,250 in cumulative penalties "are excessive when measured against the licensee's conduct and the purposes sought to be achieved by the penalty provisions." *Id.* at 104.

The magnitude of the $14.8 million fine in this case is purely the result of the government's unreasonable delay in notifying Reynolds of the claimed infraction and bringing this action. Reynolds conducted its promotions openly and in the good faith belief that such activities fell within the exception to Section 118950 for separate, adult-only facilities leased on public grounds. Despite its belief that its activities were legal, Reynolds ceased all sampling (in addition to its lawful coupon distributions) on public grounds as soon as the Attorney General initiated the investigation that led to this lawsuit. All of the events still at issue in this case occurred *before* the Attorney General even discussed Section 118950 with Reynolds.

As was the case in *Walsh*, the Attorney General was long aware of the sampling activities on public grounds that now form the basis for the $14.8 million fine. In compliance with state tax requirements, Reynolds has for many years notified State agencies of the date and location of its distribution of cigarette samples. *See* JA 1264-67. In fact, the State produced similar tax documents to Reynolds in response to discovery requests *in this case*, making clear that for years it knew of and did nothing about Reynolds' distribution of free cigarettes on public grounds. Had the State acted promptly, *none* of the distribution at issue in this case would even have taken place. The Attorney General's delay and subsequent accumulation of multiple penalties violate the legislative intent behind Section 118950 by making meaningless the "relatively light

penalty for the initial violation with the threat of more severe penalties." *Walsh*, 13 Cal. 3d at 102. Because the size of the fine relates to the statute's penalty structure and the Attorney General's delay, the multi-million dollar penalty is grossly disproportional to any harm caused by the violations.

CONCLUSION

This Court repeatedly has acknowledged the importance of according federal precedents great deference in construing federal statutes. The majority decision below does violence to that well-established principle, and does so in an unprincipled way—concluding that a free sample is not a promotion. This conclusion "cannot be squared with the language of the pre-emption provision." *Reilly*, 533 U.S. at 548.

In addition, Reynolds was erroneously found to have violated Section 118950 by giving free cigarettes to current adult smokers in age-restricted facilities even though Section 118950 expressly allows such distribution on grounds where minors are denied access. Finally, the $14.8 million fine against Reynolds for these activities in the face of undisputed evidence that Reynolds acted in accordance

with a good faith belief that its actions complied with Section 118950 and an absence of evidence that those actions caused any cognizable harm. The decision below should be reversed.

DATED: February ___, 2004.

Respectfully,

H. JOSEPH ESCHER III
MARC HABER
CHANDRA MILLER FIENEN
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation

By_____
H. JOSEPH ESCHER III

Attorneys for Defendant and Petitioner R.J. Reynolds Tobacco Company

CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. R. CT. 29.1(c)

Pursuant to California Rule of Court 29.1(c), and in reliance upon the word count feature of the software used, I certify that the attached Petitioner's Brief On The Merits contains 13,941 words, exclusive of those materials not required to be counted under Rule 29.1(c).

MARC HABER

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

An extra section break has been inserted above this paragraph. Do not delete this section break if you plan to add text after the Table of Contents/Authorities. Deleting this break will cause Table of Contents/Authorities headers and footers to appear on any pages following the Table of Contents/Authorities.